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IN THE

Supreme Court of the United States

OCTOBER TERM, 1963

No. 962

WILLIAM C. MARSHALL, BARNEY HOPKINS, AUGUST SCHOLLE, ALEXANDER D. FULLER and CHARLES A. ROGERS,
Appellants,
vs.
JAMES M. HARE, Secretary of State of State of Michigan, and
FRANK D. BEADLE, JOHN W. FITZGERALD, and PAUL C. YOUNGER, Senators of the State of Michigan, and
STANTON S. FAVILLE, Chief Assistant Attorney General of the State of Michigan,
Appellees

ON APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF MICHIGAN, SOUTHERN DIVISION

JURISDICTIONAL STATEMENT

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JAMES M. HARE, Secretary of State of State of Michigan, and
FRANK D. BEADLE, JOHN W. FITZGERALD, and PAUL C. YOUNGER, Senators of the State of Michigan, and
STANTON S. FAVILLE, Chief Assistant Attorney General of the State of Michigan,
Appellees

ON APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF MICHIGAN, SOUTHERN DIVISION

JURISDICTIONAL STATEMENT

This is an appeal by William C. Marshall, et al., from a judgment entered on March 16, 1964 by the District Court of the United States for the Eastern District of Michigan, Southern Division, by a three-judge statutory court specially convened under the provisions of 28 U.S.C. §2281.

This Statement is submitted by appellants to show that the Supreme Court of the United States has jurisdiction of the appeal and that a substantial federal question is presented.

OPINIONS BELOW

The majority opinions of the District Court are unreported at this date and are appended to this jurisdictional statement as Appendix A, at p. 1a. The dissenting opinion of District Judge Roth is appended to this statement as Appeendix B, at p. 23a.

The Judgment of the District Court is appended as Appendix C, at p. 37a.

JURISDICTION

This suit was instituted by appellants under 42 U.S.C. §1983, *et seq.*; 28 U.S.C. §1343; 28 U.S.C. §§2281 and 2284; and 28 U.S.C. §2201, seeking a declaratory judgment and injunctive relief restraining the enforcement, operation and application of Art. IV, §§2-6 of the Michigan Constitution of 1963, appellants being denied full and equal voting rights in the election of members of the Michigan legislature thereunder, as secured by the provisions of the equal protection clause of the Fourteenth Amendment to the United States Constitution.

Notice of Appeal to this Court was filed on March 20, 1964.

The jurisdiction of this Court to review this decision by direct appeal is conferred by 28 U.S.C. §1253.

The following decisions sustain the jurisdiction of this Court to review the judgment on appeal in this case:

Baker v. Carr, 369 U.S. 186; *Maryland Committee for Fair Representation v. Tawes*, 228 Md. 412, 180 A. 2d 656 (1962), 229 Md. 406, 184 A. 2d 715, Docket No. 29, this Term, *prob. juris.* noted, 374 U.S. 804; *Davis v. Mann*, 213 F. Supp. 577 (E.D., Va. 1962), Docket No. 69, this Term, *prob. juris.* noted, 374 U.S. 803; *Sims v. Frink*, 208 F. Supp. 431 (M.D., Ala., 1962), *sub noms., Reynolds v. Sims, Vann v. Frink, McConnell v. Frink*, Docket Nos. 23, 27, 41, *prob. juris. noted*, 374 U.S. 802; *W.M.C.A., Inc. v. Simon*, 208 F. Supp. 368 (S.D., N.Y., 1962), Docket No. 20, this Term, *prob. juris.* noted, 374 U.S. 402; *Sincock v. Duffy*, 215 F. Supp. 169, *sub nom. Roman v. Sincock*, Docket No. 307, this Term, *prob. juris.* noted; *Lisco v. Love*, 219 F. Supp. 922, *sub nom. Lucas v. Forty-fourth General Assembly of Colorado*, Docket No. 508, this Term., *prob. juris.* noted; *Nixon v. Herndon*, 273 U.S. 536; *Smiley v. Holm*, 285 U.S. 355; *Turman v. Duckworth*, 329 U.S. 675; *U. S. v. Classic*, 313 U.S. 299; *U.S. v. Saylor*, 322 U.S. 385.

STATUTES INVOLVED

Art IV, Secs. 2-6, inclusive, of the 1963 Michigan Constitution is set forth in Appendix D, *infra*, at p. 38a.

42 U.S.C. §§1983 and 1988, and 28 U.S.C. §1343 (3), are set forth in Appendix E, *infra*, at p. 43a.

The United States Constitution, Amendment XIV, Sec. 1, is set forth in Appendix F, *infra*, at p. 44a.

QUESTION PRESENTED

Do Michigan's 1963 constitutional provisions, which *inter alia* base Senate representation on "land area" and in substantial and disparate degree, and "insofar as possible" maintain districts heretofore adjudged unconstitutional as arbitrary and capricious, and which provide for an apportionment agency itself selected geographically, and which thereby and otherwise disfavor metropolitan residents, creating district population disparities exceeding 4-1; and which grant House representation to each county or group of counties having 77% of ratio, following county lines, and with 2-1 disparities; violate the equal protection clause of the Fourteenth Amendment?

STATEMENT OF THE CASE

Appellants, as citizens of the United States and the State of Michigan, and as qualified and registered electors of each, brought suit in behalf of themselves and others to declare invalid and enjoin the implementation of the provisions of the Michigan Constitution of 1963, Art. IV, Secs. 2-6, inclusive, pertaining to legislative apportionment.

The Attorney General of Michigan, appearing for the Secretary of State, concurred in Appellants' position and prayer. The remaining Appellees intervened in opposition.

The provisions were adopted by a constitutional convention convened in 1961, pursuant to 1961 referendum authorization of the Michigan electorate, and composed in part of delegates from districts later declared unconsti-

tutional in *Scholle v. Hare*, 367 Mich. 176, 116 N.W. 2d 350 (1962), pet'n for cert. pending *sub nom., Beadle v. Scholle*, Docket No. 24.[1]

The constitution was adopted by a majority of the delegates on August 1, 1962, and thereafter approved by the Michigan electorate April 1, 1963. The margin of adoption was 7,424 out of a total vote of 1,614,296 or a vote plurality of .0046%, as determined by recount.

The revised constitution included within it the provisions here under attack. Essentially, the provisions for the 38-seat Senate—described as the "area"-based body—established a complex plan of according "factors" to each of the counties, based upon their relative percentages of area IN A LITERAL SENSE and population, with the counties as thus pre-weighted to be joined together in the formation of districts; existing districts were to be retained "insofar as possible." The provisions for the 110-seat House—described as the "population"-based chamber—established a plan guaranteeing representation to each county or group of counties having a minimum percentage of the state's population, though less than "ratio", specifically, 7/10ths of 1%,[2] with remaining seats to be distributed under a mathematical system designated as the "method of equal proportions". Appellants challenged both houses as departing arbitrarily and substantially from a population standard and securing minority control in each.

The extraordinary provisions as to the Senate provide that to each county's percentage of the total state "land

[1] Delegates were selected, one each, from Senate and House districts then existing. Art. XVII, §4, Mich. Const., 1908, as amended.

[2] And therefore 77% of "ratio", which is .9091% for the 110 seat body (100% ÷ 110).

area"[3] there be *added (not multiplied)* 4 times its percentage of the state's population, with the aggregate percentages (then called "factors") to serve as the basis for joinder to other counties in the formation of districts. Complete details are set out in the margin.[4] While advertised by the delegates and the plan's proponents as an "80% population-20% area" formula, implying that representation was to be uniformly based in each senatorial district 80% on population and 20% on land area, in fact *no such representation is provided anywhere, except for the entire state in the aggregate* (there being 4 x 100%, or 400 population "factors," plus 1 x 100%, or 100 area "factors"). Rather, the formula necessarily creates grossly disparate representation in every county and therefore every district

[3] In fact, "land area" embraces water, under borrowed U.S. census definition: "*Land* was defined to include: Dry land and land temporarily or partially covered by water, such as marshland, swamps, and river flood plains; streams, sloughs, estuaries and canals less than one-eighth of a statute mile in width; *and lakes, reservoirs, and ponds having less than 40 acres of area.*" (Emphasis added.)

[4] 1. Each county's percentage of the total state population is determined and then rounded to 2 decimal places.

2. Each county's percentage of the total state land area is computed and rounded to 2 decimal places.

3. Four times the population percentage for each county is then added to one times the county's area percentage. (The percentages are called "factors", and because they will total 100% of the State's area and 400% of its population, there will be a total of 500%, or 500 factors, state-wide).

4. The counties are then divided into 2 groups: those having 13 or more apportionment factors and those having less than 13 factors. (The number 13 is apparently selected because it represents the nearest whole number to the average number of factors for all districts—i.e., 500 factors divided by 38 seats equals 13, rounded).

5. The percentage of the total apportionment factors possessed by each class of counties is then multiplied by the number of total seats, i.e., 38, in order to determine the percentage of the whole Senate to which each class is entitled. The resulting product is then rounded to the

(Continued on next page)

in the state, with populous, densely settled areas being consistently disadvantaged, and sparsely settled, rural areas being consistently favored. This follows because the populous areas derive relatively no representation from their area, while rural areas tend to draw most of their representation from that source. (See Appendix G, 45a, and

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(Continued from preceding page)

nearest whole number. (Thus, in 1960, the 5 "Class 1" counties, namely, those having at least 13 factors each Wayne (Detroit), Oakland (metropolitan Detroit), Macomb (metropolitan Detroit), Genesee (Flint), and Kent (Grand Rapids), with an aggregate population of 57.52%, will receive by virtue of their 236.16 total factors, 47.23% of the 38 seats in the Senate, or 17.95, which, rounded off, gives 18. The remaining counties, i.e., the "Class 2" counties, will receive the remaining 20 seats.

6. Within the "Class 1" counties, i.e., the more populous ones, having 13 or more factors each, one seat is allocated to each of such counties and then by the mathematical method of equal proportions the remaining seats are distributed on a basis of relative priority.

7. Within each metropolitan county entitled to more than 1 Senate seat, single member districts are to be constructed with regard to incorporated city or township boundary lines as far as possible. The population of such districts within a single county must be as nearly equal as possible, but may not be less than 75 percent nor more than 125 percent of the average district population of the county.

8. Within the Class 2 group of counties, i.e., those having less than 13 factors each, existing districts are to be retained "insofar as possible", except as necessary to comply with "the above standards", which counties are to be combined to form single member districts having not less than 10 nor more than 16 factors, being "compact, convenient, and contiguous by land, as rectangular in shape as possible," and having as nearly as possible 13 apportionment factors.

To summarize, two classes of districts are established, one the more populous counties having each at least a ratio of factors *(not a ratio of population)* and two, all others. The populous or urban counties, i.e., the "Class 1" counties, then receive in the aggregate the percentage of Senate seats which their aggregate percentage of total state factors, *not population*, entitles them, with intra-class distribution subsequently occurring by the method of equal proportions. On the other hand, the "Class 2", or rural counties, having received their aggregate allotment, receive a distribution of seats, then, with the permissible spread of 10 to 16 factors, with existing districts not to be disturbed unless they fail to comply with such standards.

demonstration in the margin.)[5] Disparities range from the extreme of 88.8% *area*-11.2% population in Keweenaw County to 0.8% area and 99.2% population in heavily populated Wayne County (Detroit).[6] District combinations blunt such county disparities only partially, leaving as much as two thirds of district weight derived from area.[7] What the plan actually does is pre-weight people relative to their adjacent space, "creating" or "extinguishing" "artificial people" before the adjusted, artificial populations are then aggregated or divided to form legislative districts. Thus, each of the 500 factors (whether drawn from space

[5] For example:

	POPULATION			AREA			
ounty	1960 Pop.	% of Mich. Pop.	Pop. Factors (4 × % of Pop.)	Square Miles	Acres	Area Factors (1 × % of Area)	Total Factors
veenaw ..	2,417	.03	.12	544	348,160	.95	1.07
yne	2,666,739	34.08	136.32	607	388,480	1.06	137.38

	% of Factors Based on Pop.	% of Factors Based on Area	Index of Rep'n (Ratio = 100.)	Senators per 100,000 Persons	Relative Rep'n (Wayne = 1.00)
veenaw	11.2	88.8	693.	3.36	8.62
yne	99.2	.8	81.	.39	1.00

How few of the metropolitan "factors" come from "area" is further realized when it is seen that the 5 "Class 1" counties with 236.16 total factors derive all but 6.08 of them from their population or only 2.6% of total factors from "area."

[6] See previous note.

[7] For example, an analysis of intervening senators' Map II B-2 exhibit "Senate—as close as possible to 13 factors", relied upon by intervenor appellees and Judge Kaess as the embodiment of the fairest expression of the "80-20" formula, would produce these disparate results:

District No.	Counties	Pop. Factors	Area Factors	Total Factors	% of Rep'n. from Pop.	% of Rep'n. from Area
1	Wayne	136.32	1.06	137.38	99.2	.8
24	Alger Baraga Houghton Keweenaw Marquette	5.68	9.18	14.86	38.2	61.8

or people) is equivalent to 15,648 persons (Michigan's population of 7,823,999 divided by 500), so that the people in each county receive an artificial weight relative to their surrounding space.[8] Bizarre consequences predictably ensue, for as the chief apologist for the plan admitted:

> "Unfortunately, this precision and certainty is achieved by introducing into the apportionment formula the concept of direct representation of land area. It is literally true, as critics of the plan have pointed out, that 19.05 acres of land are given precisely the same weight in calculating the apportionment factors as 1 person. As population increases and land area remains constant, the acres per person equation will find a smaller number of acres required to equal one inhabitant." John P. White, "Apportionment and Representative Institutions, the Michigan Experience" (Institute of Social Science Research, 1963), at p. 338.

In specific application, the predictable, current consequences of the plan are undisputed.

The "Class 1" (or metropolitan counties) under the plan,[9] with an aggregate population of approximately 4.5 million or 57.5% of the state's population, will have only 18 senators out of 38, or approximately 47% of the Senate, since they receive in the aggregate only 47.2% of the state's total "factors". On the other hand, the remaining residents of the state, some 3.3 million persons, or nearly 1.2 million

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[8] For example:

County	Actual Pop. 1960	Total Factors of County	"Artificial People" (Factors × 15,648)	Difference	% of Difference	Index of Rep.
Wayne	2,666,739	137.28	2,149,722	—517,017	—19.39	81.
Keweenaw	2,417	1.07	16,743	+14,326	+592.72	693.

[9] For 1960, Wayne, Oakland, Macomb, Genesee and Kent, each alone having at least 15 "factors". Art. IV, Sec. 2(1).

less, will elect two more senators, or a total of 20, for 53% of the Senate since they receive (by difference) 52.8% of the aggregate "factors".

The 10% aggregate loss of seats in the metropolitan areas means specifically a 4-seat loss to those counties, and a consequent 4-seat gain to less populous, rural areas. (The net eight seat shift out of 38 results precisely from the aggregate 20% area factor of the "80%, 20%" formula). Wayne County (Detroit) gets 10 seats instead of the 13 to which its 34.08% of state population entitles it, or 26.32% of the Senate seats, while Kent gets 1 seat (2.63% of Senate) instead of the 4.64% to which it is entitled.

Not only will the metropolitan counties receive in the aggregate approximately 10% less representation in the Senate than that to which their population entitles them, and the rural areas 10% more, but predictable district populations will vary more than 4-1, and could vary as much as 8-1. Thus, the largest district will invariably be Kent County (363,187 persons), while the smallest district will contain as few as 45,105 persons, and no more than 97,360, under 1960 census figures.

Further, the minimum percent of the state population represented by a majority of members of the Senate will be approximately 40%, based on the 1960 census, and conceivably may decline in future years to a slightly lesser percent.

In the sparsely settled Upper Peninsula, the extraordinary consequence of this formula for literal area representation is that representation is accorded to sections of the state which are *either substantially or totally uninhabited*. Thus, because of its area component of 29.01 "factors", accounting for some 65% of its total representation, and based substantially upon huge, publicly owned state and

federal fish, forest and wildlife preserves, the Upper Peninsula will receive in perpetuity, *even without any inhabitants*, a minimum of two senators, but for practical purposes three (as before) as long as there is some minimal human habitation. Indeed, 30% of all Michigan "area" representation will come from public lands!

Appellants claimed that the "80-20" formula is defective in that: (1) it literally represents space—an inherently invidious, irrational and arbitrary concept; (2) it does so in grossly excessive degree—with population disparities of at least 4-1, and possibly up to 8-1; (3) it establishes in application disparate and varying ratios of population and area for each county and for each district of the state; (4) it accords more representation for space than for people in approximately one-half of the state's counties (with variations as high as 89% area, 11% people) (See Appendix G) and in a substantial number of districts; (5) it inherently will weight space more favorably relative to population as the state's population increases and its area, of course, remains constant; (6) it inherently allots different representation to the citizens of each county of multi-county senatorial districts, contrary to the minimal holding of *Gray v. Sanders*, 372 U.S. 368, which requires at least equal treatment of all voters in a single constituency;[10] (7) it requires the continued utilization "insofar as possible" of existing districts heretofore held violative of the Fourteenth Amendment as arbitrary and capricious, in *Schaller v. Hare*, 367 Mich. 176, app. for cert. pending this Term, No. 24; and (8) it does all of these things with the purpose and/or effect of disfavoring voters in more populous or urban

[10] While admittedly each voter in such districts casts a single ballot, that ballot has been pre-weighted through the pre-weighting of counties; that proposition is hardly distinguishable from the post-weighting of *Gray*.

counties as a class, both as far as the citizens in given metropolitan counties are concerned relative to outstate counties and insofar as citizens of metropolitan counties in the aggregate receive less representation than that to which their population would entitle them.

Appellants also attacked the House provisions because of the arbitrary departures from a population standard otherwise provided, including the guarantee of a full seat to a county with less than a ratio of population, specifically, 7/10ths of 1% in a 110 seat chamber, or 77% of ratio; the inflexible adherence to county lines except in multi-seat counties; and the authorized intra-city variations of 75-125% of ratio. In application, these provisions permit, *in the body allegedly based strictly on "population,"* a 2-1 disparity in district populations, a net 4-seat shift from the populous counties to the less populous ones *over and above the consequences of adherence to county lines*, and minority control of the House as well as the Senate.

Appellants further challenged the Legislative Apportionment Commission itself, the administrative agency established by Art. IV, §6, established *entirely* on an "area" basis, drawing eight members, 4 each from opposing political parties, from 4 arbitrarily designated quadrants of the state. In effect, 8% of the persons of Michigan are given representation on the Commission equivalent to the remaining 92%.

The Court below, by a 2-1 vote, denied appellants all relief. Although acknowledging that in the Senate "the ratio of the population of the most populous district to that of the least populous will probably exceed four to one", it found the disparity not excessive. It excused the literal representation formula on the basis of an assumed rational and permissible objective of "assurance of adequate repre-

sentation to a sparsely populated and impoverished region", namely, the Upper Peninsula and the northern part of the lower peninsula—although appellees made no such argument and there is nothing in the formula limiting its application to any particular region. It rationalized metropolitan voter shortcomings, by arguing that "urban" majorities—arbitrarily defined—will prevail. It excused House disparities as minimal and an appropriate concession to "persons living in sparsely populated areas"—although there is no density factor whatsoever in the House provisions, and the disparities alleged above were conceded. Finally, it justified everything on the basis that the voters had spoken.

Implicit in the majority opinions and in the constitutional provisions themselves is the assumption that *allegedly* substantial adherence to population in one house excuses gross departures from population in the other. Only thus can the preoccupation of the majority with justifying a supposed 4-out-of-110 seat population departure in the House,[11] while expressing virtual indifference to a five-times-greater, 8-out-of-38 (20%, rounded) departure in the Senate, be explained.

In an eloquent dissent, Judge Roth held the provisions of *both* Senate and House invalid. He ruled the Senate "area" concept of representation as bad *per se*, as unrelated to any valid legislative purpose or the interests of people; as contrary to traditional Michigan legislative apportionment provisions historically based on population; and as "arbitrary, capricious and constitutionally unjustified. There is here no 'practical equality' with 'rational deviations'". He deemed the House provisions equally bad—because of the ".7%," "75%-125%", and similar provisions.

[11] Which, however, is purposeful, arbitrary and avoidable.

Plaintiffs filed notice of appeal on March 20, 1964.

THE FEDERAL QUESTION IS SUBSTANTIAL

This case presents the very apotheosis—or *reductio ad absurdum*—of "area" representation. Heretofore "area" representation has been rhetoric; here it is reality. Where before, the "area" reference served as a figurative, conceptual catch-all for plans of representation other than population, here it is literal in design and application.

As such, the plan is unprecedented in the history of the United States. As written by one commentator before its adoption, "this provision if adopted will be the only state constitutional apportionment rule which frankly recognizes area in terms of square miles as a basis of apportionment. Other states undoubtedly recognize area but this recognition, which might be justified for other reasons, evolves from the fixing of districts in the constitution or the giving of minimal representation to each county."[12]

Nor are such provisions expressly before this Court in those cases heretofore argued or pending:

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[12] University of Michigan Law Professor William J. Pierce, "Apportionment and Representative Institutions, the Michigan Experience", (The Institute for Social Science Research, 1963) p. 97.

And, as Professor John P. White, an apologist for the plan, wrote:

"[T]he plan proposed for the senate is totally unlike the apportionment system used in any other state legislative body." *Op. cit.*, p. 264.

And,

"[W]hatever the final judgment of the people of the state as well as of the courts of law, the apportionment provisions of the new constitution were and are sharply different from the old constitution. The method of apportioning the senate is not only different from the old constitution, but different from the apportionment system used in any other state in the union." *Op. cit.*, p. 239.

> "There is not in any of the cases now before the Court such a bald attribution of weighting to area as in Michigan [although] in each of the cases the effect of the existing provisions is to favor land masses directly or indirectly, necessarily at the expense of the right of franchise of individual voters."[13]

Thus, the Michigan provisions are to be distinguished even from the arbitrary features of the Illinois Constitution before this Court in *Germano, et al. v. Kerner, et al.*, this Term, No. 636, in terms imposing an "area" standard and dividing Illinois into three arbitrary segments, with the random allocation of Senate districts to each.[14] Yet both the Illinois Supreme Court in *Donovan v. Holzman*,

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[13] Dean Robert B. McKay, N. Y. U. Law School, *Amicus* brief of the A. J. C., ACLU and NAACP in Nos. 20, 29, 23, 27, 41 and 69, this Term, *W. M. C. A., Inc., Maryland Committee, Reynolds, Vann, McConnell* and *Davis, et al.*

[14] Article IV, Section 6, as amended, of the Constitution of Illinois provides:

"§6. Senatorial districts—Redistricting—Number of senators—Terms.

"The General Assembly in 1955 shall redistrict the state for the purpose of electing state senators. There shall be fifty-eight senatorial districts. Cook county shall have twenty-four of the districts. These twenty-four districts shall be located as follows: Eighteen in the territory that is within the present limits of the city of Chicago; and six in the territory that is in Cook County outside such corporate limits. The remaining one hundred and one counties of the state shall have thirty-four of the senatorial districts.

"All senatorial districts shall be formed of contiguous and compact territory. *In their formation, area shall be the prime consideration.*

"The senatorial districts shall be numbered one, two, three, and so forth, including fifty-eight. Each such district shall elect one senator, whose term of office shall be four years. Senators elected in districts bearing even numbers shall be elected in 1956 and every four years thereafter; and senators elected in districts bearing odd numbers shall be elected in 1958 and every four years thereafter." (Emphasis added.)

8 Ill. 2d 87, 132 N.E. 2d 501 (1956), and the majority in *Germano*, 220 F. Supp. 230 (N.D. Ill., 1963), shrank from a literal construction of the "area" command of the Illinois constitution, a majority opinion in the latter holding it would be "legal folly to contend that the Amendment intended to equate representation in the senate in proportion to square miles. Such a view would have our system of government retrogressing to a ~~federal~~ feudal arrangement where land ownership was synonymous with political power."

Yet that is precisely what Michigan has done. And Nebraska—following Michigan's example—has since done the same.[15] The latter plan, establishing a variable 70%-80% "population," 30%-20% "area" formula, is before a three-judge federal panel in *League of Nebraska Municipalities, et al. v. Marsh, et al.*, U.S.D.C., D., Neb., Civil 551 L, which panel recently stayed its own hand (unreported

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[15] Art. III, §5, of the Constitution of Nebraska, as amended by voter initiative, now provides:

"Sec. 5. At the regular session of the Legislature held in the year nineteen hundred and thirty-five, the Legislature shall by law determine the number of members to be elected and divide the State into Legislative Districts. In the creation of such Districts, any County that contains population sufficient to entitle it to two or more members of the Legislature shall be divided into separate and distinct Legislative Districts, as nearly equal in population as may be and composed of contiguous and compact territory. After the creation of such Districts, beginning in nineteen hundred and thirty-six and every two years thereafter, one member of the Legislature shall be elected from each such District. The basis of apportionment shall be the population excluding aliens, as shown by next preceding Federal Census. The Legislature may redistrict the State from time to time, not more often than once in ten years. In any such redistricting, County lines shall be followed whenever practicable, but other established lines may be followed at the discretion of the Legislature. *In such redistricting, primary emphasis shall be placed on population and not less than twenty per cent nor more than thirty percent weight shall be given to area.*" (Emphasis added.)

opinion, March 3, 1964), pending anticipated guidance from this Court in other cases.[16]

The beguiling superficial rationality of such a system, however "feudal" in tenor and fact, means that not only in Michigan, but nationally, will acres-people equations be generally adopted if the view of the Court below is ultimately validated. As stated by one writer:

> "Having been approved by the people of Michigan, it will—if it survives the inevitable judicial examination—almost certainly be considered by other states that wish to adopt a legally defensible method of granting special consideration to sparsely populated areas."[17]

For, just as in Michigan it was supposed by the draftsmen of the present plan—over-reacting to and miscomprehending the import of *Baker v. Carr* and *Scholle v. Hare*—that form and *formula* would suffice for substance, draftsmen elsewhere can similarly verbalize a people v. acres equation for virtually any malapportionment anywhere *which would otherwise fail under any Fourteenth Amendment tests of this Court.*

While proponents excuse the Michigan plan on the basis that that kind of people v. areas *result* can now be *deduced* elsewhere, surely that kind of invidious consequence as an *objective* can not be valid under the Fourteenth Amendment equal protection clause. Moreover, that a plan is intelligible —as this admittedly is—does not make it rational, even if its subordination of the population principle (diluting voter representation by more than 4-1, and up to 8-1) were

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[16] Earlier opinion appeared at 209 F. Supp. 189.

[17] Professor John P. White, "Apportionment and Representative Institutions, No. 69, The Michigan Experience," p. 235.

not gross. Nor can a reference to population "density" excuse invidious and disparate treatment of citizens; for to talk of population "density" or "sparsity" is but to speak of "the same [invidious] thing as giving more representation to rural than urban areas[,] as population density is much lower in the former than in the latter." *Amicus* brief of United States, p. 42 n. in *Davis v. Mann*, this Term. Further, "An apportionment based in whole or in part on area would also be invidious since legislators represent people, not land." *Id.* p. 43, n. 22. And unsupported —and unsupportable—rationalizations by the majority below for the deliberate grant of political power as an economic subsidy to allegedly "impoverished" and less "fertile" regions of the state, indeed with such regions being artificially and arbitrarily defined,[18] are even more indefensible.

Considering the number and breadth of cases in the area of legislative apportionment already before this Court, including those argued and or still pending,[19] and the conflicts and disparate views of the lower courts, already well

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[18] Judge Kaess lumps together for analysis the Upper Peninsula and northern Lower Peninsula, though intervenors argued as to the allegedly unique insularity of the Upper Peninsula alone as entitling it peculiarly to special consideration. And neither the majority nor intervenors explained, or offered to explain, *the rural advantages everywhere in the state.*

[19] *Maryland Committee for Fair Representation v. Tawes*, 228 Md. 412, 180 A. 2d 656 (1962), 229 Md. 406, 184 A. 2d 715, Docket No. 29, this Term, *prob. juris.* noted, 374 U.S. 804; *Davis v. Mann*, 213 F. Supp. 577 (E.D., Va., 1962), Docket No. 69, this Term, *prob. juris.* noted, 374 U.S. 803; *Sims v. Frink*, 208 F. Supp. 431 (M.D., Ala., 1962), *sub nom., Reynolds v. Sims, Vann v. Frink, McConnell v. Frink*, Docket Nos. 23, 27, 41, *prob. juris.* noted, 374 U.S. 802; *W.M.C.A., Inc. v. Simon*, 208 F. Supp. 368 (S.D., N.Y., 1962, Docket No. 20, this Term, *prob. juris.* noted, 374 U.S. 402; *Sincock v. Duffy*, 215 F. Supp. 169, *sub nom., Roman v. Sincock*, Docket No. 307, this Term, *prob. juris.* noted; *Lisco v. Love* (Colo., 1963), 219 F. Supp. 922, *sub nom. Lucas v. Forty-fourth General Assembly of Colorado*, Docket No. 508, this Term, *prob. juris.* noted; *inter alia.*

known to this Court, it would be superfluous to argue at length to the Court the substantiality of the federal questions involved in this cause and others. But while each litigant may well argue to this Court the import of his own cause, surely it must be recognized that the consequences of the present provisions, if sustained, transcend all local borders, are nationwide in scope and import, and present a frightening spectre as to the future of the effective franchise in a democratic government in the field of legislative apportionment. FOR IF THESE PROVISIONS STAND, ANY CAN—if imaginatively verbalized.

That the provisions below were adopted by voter initiative as part of a total state constitution will not alter the consequences, the majority below to the contrary notwithstanding. Surely, as has been repeatedly and correctly held by and argued to this Court, constitutional rights can not be dependent upon majority vote.[20] Surely this is so in the present instance where the margin of success was infinitesimal; the election pertained to the adoption of an *entire* constitution, rather than to specific apportionment provisions; those apportionment provisions were extraordinarily complex; and the proponents of the new constitution urged voters to adopt the constitution *notwithstanding the apportionment provisions, which voters were told would be the subject of independent judicial review.*[21] Having success-

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[20] *West Virginia State Board of Education v. Barnett*, 319 U.S. 624 (1942) at p. 638; *Thigpen v. Meyers*, 211 F. Supp. 826, pending on appeal, this Term No. 381; *Scholle v. Hare, supra.*

[21] Said then Governor-elect Romney, as reported in the Lansing State Journal, December 18, 1962:

"Romney commented to newsmen that he did not regard the legislative apportionment provisions of the new constitution as a key factor on which to decide its fate at the polls. The reason, he said is that the United States Supreme Court has really taken that question out of our hands.'

(Continued on next page)

fully urged to voters the withdrawal of apportionment issues as a judicial question, the proponents reversed field and urged to the courts that the voters' action was a binding political one. Surely the Court below erred in agreeing. *West Virginia v. Barnett, supra; Scholle v. Hare, supra; Thigpen v. Meyers, supra; et al.* Nor can the illusory availability of an initiative afford an adequate remedy for protection of what is, after all, an individual voter's right. *Cf. League of Nebraska Municipalities v. Marsh*, 209 F. Supp. 189 (3-judge panel); *Scholle v. Hare, supra.*

This case presents in stark dimensions of national consequence whether a "gimmick" whose purpose is evident to all will be called for what it is.[22] In final analysis, though dressed up in pseudo-scientific, sophisticated garb, the present provisions have in common what all apportionment provisions not based substantially on population customarily do, namely, an attempt by some verbal rationalization to preserve the status quo. Recoiling from the now acknowledged[23] caprice of the districts condemned in *Scholle*, the

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(Continued from preceding page)

> 'Whatever it (the Supreme Court) decides on apportionment is what Michigan is going to do, regardless of what the new or the old constitution says,' he said. 'So the citizens of this state should not permit that question to determine their attitude on the new constitution.'"

[22] For an account of the political history and setting of the constitutional convention, see Jewell, "The Politics of Reapportionment" (Atherton Press, 1962), Chapter 15 (Prof. Karl A. Lamb); and Lamb, "Apportionment and Representative Institutions" (The Institute for Social Science Research, 1963), pp. 151-226.

[23] In this very case at trial, counsel for the Intervening Senators (the same intervenors as in *Scholle*) finally conceded the basis for decision, and the correctness of *Scholle*—as we have previously argued to this Court, in No. 24:

> "And, as Mr. Sachs said yesterday, the Michigan Supreme Court invalidated the constitution in *Scholle* because it was a crazy quilt."

new provisions' proponents sought to infuse the *appearance* of rationality, if not its substance, and to retain "insofar as possible" that which was previously held—and known to be—vulnerable. If *Baker v. Carr* condones such provisions, then it will be a dead letter before it ever gets really applied.

CONCLUSION

We respectfully and urgently urge this Court to accept appeal herein for plenary review and to reverse decision below.

Such action is essential to the nation as a whole.

Respectfully submitted,

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Dated: March 27, 1964.

APPENDIX A

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

WILLIAM C. MARSHALL, et al., *Plaintiffs,* v. JAMES M. HARE, Secretary of State, of the State of Michigan, *Defendant,* and FRANK D. BEADLE, et al. *Intervenors.*	Civil No. 24013

OPINION

KAESS, District Judge.

On June 20, 1963, the Board of State Canvassers certified that the vote on the Constitution proposed by the Michigan Constitutional Convention was 810,860 to 803,436 in favor of adoption. On June 21, 1963 this suit was brought to declare the provisions relating to the apportionment of the legislature, Mich. Const., 1963, Art. IV, §§2-6, invalid under the Fourteenth Amendment. The plaintiffs are Michigan citizens and qualified electors residing in Wayne County, Oakland County, and Muskegon County. The allegations of the complaint are that the provisions of the Michigan Constitution are irrational, are invidiously and

purposefully discriminatory, and grossly impair the right to vote of the plaintiffs and other Michigan citizens similarly situated.

The plaintiffs have urged the invalidity of any plan of apportionment adopted in accordance with the provisions of the Michigan Constitution. The defendant, the Michigan Secretary of State, has joined in the presentation of the plaintiffs' case, and left the defense of the Michigan Constitution to the intervening Senators and Chief Assistant Attorney General. The defendant has suggested, however, that it would be premature to consider the constitutional questions presented until a definite plan of apportionment has been adopted.

Various plans proposed by members of the Commission on Legislative Apportionment have already been submitted to the Supreme Court of Michigan. The responsibility of determining which plan complies most accurately with the requirements of the Michigan Constitution now rests with that Court. Mich. Const., 1963, Art. IV, §6. While constitutional questions must be considered on the basis of specific facts and not abstractly, it is of grave concern to us that the processes of state government may be interrupted through prolonged litigation. No plan of apportionment has been adopted, yet the tendency of the provisions of the Michigan Constitution can be foretold, and the degree of departure from the principle of equal population accurately predicted.

In accordance with the decision in *Baker v. Carr*, 369 U.S. 186, we hold that we have jurisdiction of the subject matter of the constitutional claim asserted in the complaint, that the plaintiffs have standing, and that we are not to be deterred from granting appropriate relief by the argument that the claim presents a political question.

The Michigan Constitution provides for a House of Representatives apportioned on the basis of population, subject only to the qualifications that county lines are to be followed in the creation of districts and that counties having a population of not less than 0.7% of the popula-

tion of the state are to be accorded separate representation. By statistical tests it may be shown that the districting set forth in the Senators' Map H A-2 embodies the principle of equal population most faithfully while adhering to county lines. Three classes have been established in our analysis—the five most populous counties, the remaining counties of the southern part of the Lower Peninsula, and the counties of the Upper Peninsula and the northern part of the Lower Peninsula.

Wayne County, at the center of the Detroit metropolitan area, stands apart. It has 34.08% of the population of the state, nearly four times the population of the next most populous county. Together the five most populous counties have 57.52% of the population of the state, the remaining counties of the southern part of the Lower Peninsula 33.58%, and the counties of the Upper Peninsula and the northern part of the Lower Peninsula 8.90%. Muskegon, Kent, Montcalm, Isabella, Midland, and Bay Counties have been selected to form a line dividing the Lower Peninsula. To the north of the line, the density of population falls sharply and there are distinct changes in climate and fertility of the soil and in the activities and income of the people.[1]

By reference to Table I it may be seen that the effect in districts created in the five most populous counties would be minimal. The effect would be appreciable only in districts created in less populous areas. In the district for Ottawa County (No. 19, Senators' Map H A-2) and the district for Shiawassee and Livingston Counties (No. 22, Senators' Map H A-2), the degree of under-representation, expressed as a percentage of the ratio of representation, would be 38.8% and 28.9% respectively. The degree of over-representation would be an average of 28.9% for the districts created in Monroe County (No. 30, Senators'

[1] Districts lying on the line have been counted as districts in the northern part of the Lower Peninsula only if a majority of the population lives to the north of the line.

Map II A-2), 32.0% for the district for Van Buren County, and 18.8% for the district for Allegan County (No. 25, Senators' Map II A-2). The ratio of the population of the most populous district to that of the least populous will exceed two to one, since the ratio of the population of Ottawa County, 98,719, to that of Van Buren County, 48,395, will exceed two to one.

It is a matter of general knowledge that county lines continue to have significance for persons who live in less populous areas. The county seat will be a focal point of political organization, and will often be the market place and the social and economic center of the surrounding countryside. There the county remains a natural unit of apportionment. In the great metropolitan areas, the county may assume greater importance than it has ever had as cities are transcended. The model for local government in the future may be the City and County of Los Angeles.

Authority to depart from the county line could create significantly more complex issues in districting. Not only could heretofore unrelated townships, villages or cities be combined, but they could be combined, for this one purpose, in a manner that cut across existing relationships in the manifold matters of local government. Of particular significance, authority to depart from county lines could lead to a patchwork or an impasse in the Commission on Legislative Apportionment. Thus there are strong arguments in favor of the county line.

The 0.7% provision permits a slight increase in the representation of persons living in sparsely populated areas. It is argued, on the one hand, that the provision is a grant of authority to the Commission on Legislative Apportionment to be exercised in its discretion, and, on the other, that it must be given full effect. Whether the provision must be given full effect is a matter of state law, to be determined by the Supreme Court of Michigan. In any event, it represents a minor departure from the principle of equal population. In Tennessee, the standard for the apportionment of the House of Representatives is

the number of qualified *voters* (as opposed to population), subject to the qualification that any county having two-thirds of the ratio of representation is entitled to one member. Tenn. Const. Art. II, §5. The Supreme Court found such a qualification minor in *Baker v. Carr, supra.* In Michigan, only counties having not less than seventy-seven hundredths of the ratio of representation[2] could be assured separate representation.

The effect of the provision would be appreciable, not in the most populous counties, but in the sparsely populated counties and the counties of intermediate population. At most, the representation of persons living in the Upper Peninsula and the northern part of the Lower Peninsula would be increased by two seats. The possible increase in representation would be made through a shift of one seat from Monroe County and one seat from Oakland County. Table II gives a general view of the departure inherent in following county lines and giving full effect to the 0.7% provision. By reference to Table III it may be seen that the most populous counties would still enjoy representation in the House very nearly in proportion to their population, even with a shift of two seats.

If the 80%, 20% formula is considered objectively, it will be found that it is equivalent to a formula in which greater weight is attached to population figures for sparsely populated areas, and that its effect is to increase the representation of persons living in the Upper Peninsula and the northern part of the Lower Peninsula. The mathematical precision of the formula adopted by the Constitutional Convention may be explained as a reaction to the decision reached by the Supreme Court of Michigan in *Scholle v. Secretary of State*, 367 Mich. 176, petition for certiorari pending before the United States Supreme Court. However, the formula is more than a recasting of the balance

[2] The Michigan House of Representatives has 110 members, making the ratio of representation 0.9091% of the population, and 0.7% of the population is approximately seventy-seven hundredths of the latter.

that existed between urban and rural areas. It represents a profound change, as it gives urban areas a clear preponderance.

DISTRIBUTION OF SEATS IN THE SENATE[3]

	Urban	Rural	Total
Under 1952 Amendment..	16	18	34
Under new Constitution..	22 or 23	15 or 16	38

Most of the additional seats for urban areas will go to the five most populous counties. Wayne County will gain three, Oakland County two, Macomb County one, and Genesee County one. Kent County will lose a seat. Together, the five most populous counties will have 18 seats, while under the 1952 Amendment they had 12.

The representatives of the four most populous counties of the state will not constitute a majority of the Senate, but the representatives of the six most populous counties will. Population and representation are compared for the Senate in Table IV. In the remaining tables, the degree of departure from the principle of equal population under three possible applications of the 80%, 20% formula is presented. The degree of under representation will be 76.39% in the district for Kent County and the average degree of under-representation will be 29.52% in the ten districts created in Wayne County. Thus the ratio of the population of the most populous district to that of the least populous will probably exceed four to one.

The people of northern Michigan are placed at an economic disadvantage due to the depletion of their natural resources and the decline of some of their industries. They are far from the seat of government, far from the great

[3] We have employed the figures for "urbanized areas" in the 1960 Census in determining the number of districts that are urban in character. The plaintiffs have not suggested any alternative figures, and apparently do not consider the balance between urban and rural areas material.

concentrations of wealth and power. The difficult problems they face often are not those faced in other areas of the state.

The Upper Peninsula and the northern part of the Lower Peninsula are separate areas economically. While they are connected by a great bridge at the Straits of Mackinac, daily travel from one area to the other is not always practicable. If the principle of equal population were applied strictly, as advocated by the plaintiffs, they would have three senators to represent them in a Senate of thirty-eight. They would have nine representatives in a House of one hundred and ten. The new Constitution will increase their representation in the Senate, possibly to seven. If full effect were given to the 0.7% provision, the new Constitution would increase their representation in the House to eleven. We find entirely reasonable the belief that such an increase is necessary to assure the people of Northern Michigan an adequate voice in the legislature. Without some weighting, their interests could be ignored completely.

In our consideration of the constitutional questions, we have been guided by the analysis made by the Solicitor General of the United States in the apportionment cases argued before the Supreme Court. The three tests advanced by the Solicitor General have been adopted: (1) whether the basis for departure from the principle of equal population can be discerned, (2) whether it represents a legitimate objective in legislative apportionment, and (3) whether the principle of equal representation is subordinated to an excessive degree.

There is agreement that the first test has been met. The basis for departure from the principle of equal population can be discerned. It is not unintelligible. It was debated in the Michigan Constitutional Convention, and was known to the people when they voted in April 1963. The substantial departure in the Senate and the possibility of a slight departure in the House result from a determination deliberately made to increase the representation of the people of Northern Michigan.

The second and third tests are also met. The assurance of adequate representation to a sparsely populated and impoverished region constitutes a proper objective, and the provisions of the new Constitution do not subordinate the principle of equal population to an excessive degree. The processes of state government, we believe, prove reponsive to the needs and interests of all areas of the state.[4] The propriety of the apportionment provisions was a matter within the legislative judgment of the people of Michigan.

It has been argued that the provisions of the new Constitution permit a tyranny by the minority. In April 1963, the vote was in favor of the adoption of the Constitution. *In November 1952, the vote was against the system of apportionment now advocated by the plaintiffs.* The plaintiffs and others who share their political philosophy have demonstrated that they possess the financial resources and the experience in political action necessary to place the matter before the people at any time. The amendment of the Constitution by petition is a vital institution in Michigan and has been resorted to on numerous occasions. In addition, the matter of general constitutional revision must be placed before the people every sixteen years. Mich. Const., 1963, Art. XII, §3. If, in the name of majority rule, we were to hold the provisions of the new Constitution invalid, after their recent adoption by a majority of the people voting on the question, and while they were subject to the processes of amendment, we would be substituting for democratic institutions, a tyranny by the judiciary.

We hold the provisions of the new Constitution neither invidious nor irrational, but (bearing in mind the almost insolvable problems of theory, the contrary opinions of political and legal commentators, and the confusion of judicial authority, both state and federal) a most remarkable result, openly and fairly reached, with ample facility for correction if need therefor arises.

The action should be dismissed.

Fred W. Kaess,
United States District Judge.

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[4] See Comment, *Baker v. Carr and Legislative Apportionments—A Problem of Standards*, 72 Yale L.J. 968, 1002-1006.

TABLE I

HOUSE OF REPRESENTATIVES—DEPARTURE FROM PRINCIPLE OF EQUAL POPULATION THAT MIGHT BE ANTICIPATED THROUGH ADHERENCE TO COUNTY LINES

	Deviation from Ratio of Representation	Districts in Five Most Populous Counties	Remaining Districts in Southern Part of Lower Peninsula	Districts in Upper Peninsula and Northern Part of Lower Peninsula
Degree of Under Representation (Positive Deviation)	40.1%-45.0%			
	35.1%-40.0%		1	
	30.1%-35.0%			
	25.1%-30.0%		1	
	20.1%-25.0%		2	1
	15.1%-20.0%		2	
	10.1%-15.0%		3	
	5.1%-10.0%	5	6	
	0.1%- 5.0%	42	2	3
Degree of Over Representation (Negative Deviation)	0.1%- 5.0%	16	7	4
	5.1%-10.0%		2	1
	10.1%-15.0%		4	
	15.1%-20.0%		1	
	20.1%-25.0%		4	
	25.1%-30.0%		2	
	30.1%-35.0%		1	
	35.1%-40.0%			
	40.1%-45.0%			
		63	38	9

Note; Based on Senators' Map II A-2. Two districts on the line—the district for Osceola, Mecosta, and Montcalm Counties (No. 16, Senators' Map II A-2) and the district for Gladwin and Midland Counties (No. 10, Senators' Map II A-2)—are counted as districts in the southern part of the Lower Peninsula.

TABLE II

HOUSE OF REPRESENTATIVES—DEPARTURE FROM PRINCIPLE OF EQUAL POPULATION THAT MIGHT BE ANTICIPATED THROUGH ADHERENCE TO COUNTY LINES AND GIVING 0.7% PROVISION FULL EFFECT

	Deviation from Ratio of Representation	Districts in Five Most Populous Counties	Remaining Districts in Southern Part of Lower Peninsula	Districts in Upper Peninsula and Northern Part of Lower Peninsula
Degree of Under Representation (Positive Deviation)	40.1%-45.0%		1	
	35.1%-40.0%		1	
	30.1%-35.0%			
	25.1%-30.1%		1	
	20.1%-25.0%		2	
	15.1%-20.0%		2	
	10.1%-15.0%		3	
	5.1%-10.0%	14	6	
	0.1%- 5.0%	42	2	
Degree of Over Representation (Negative Deviation)	0.1%- 5.0%	6	6	1
	5.1%-10.0%		2	2
	10.1%-15.0%		4	2
	15.1%-20.0%		1	2
	20.1%-25.0%		5	4
	25.1%-30.0%			
	30.1%-35.0%		1	
	35.1%-40.0%			
	40.1%-45.0%			
		62	37	11

Note: Based on Senators' Map II A-3. Two districts on the line—the district for Mecosta and Isabella Counties (No. 17 Senators' Map II A-3) and the district for Gladwin and Midland Counties (No. 19 Senators' Map II A-3)—are counted as districts in the southern part of the Lower Peninsula.

TABLE III

HOUSE OF REPRESENTATIVES—COMPARISON OF POPULATION AND REPRESENTATION FOR THE MOST POPULOUS COUNTIES

	Seats	Percentage of Population	Percentage of Seats in House Giving 0.7% Provision Full Effect
Wayne County	37	34.08	33.64
Oakland County ...	9	8.83	8.18
Macomb County ...	6	5.19	5.45
Genesee County	5	4.78	4.55
Kent County	5	4.64	4.55
Ingham County	3	2.70	2.73
Four Most Populous Counties	57	52.88	51.82
Five Most Populous Counties	62	57.52	56.36
Six Most Populous Counties	65	59.96	60.22
Ten Most Populous Counties	74	68.95	67.27

TABLE IV

SENATE—COMPARISON OF POPULATION AND REPRESENTATION FOR THE MOST POPULOUS COUNTIES

	Seats	Percentage of Population	Percentage of Seats in Senate
Wayne County	10	34.08	26.32
Oakland County ...	3	8.83	7.89
Macomb County ...	2	5.19	5.26
Genesee County ..	2	4.78	5.26
Kent County	1	4.64	2.63
Ingham County[a] ..	1	2.70	2.63
Four Most Populous Counties	17	52.88	44.74
Five Most Populous Counties	18	57.52	47.37
Six Most Populous Counties[a]	19	60.22	50.00

(a) It is assumed that Ingham County has been given separate representation. See Senators' Maps II B-2, II B-3, II B-4, and II B-5. Ingham County might be joined with Clinton County. See Map II B-6. The population figures would then be slightly greater.

TABLE V

SENATE—STRAIGHT POPULATION APPORTIONMENT—DEPARTURE FROM PRINCIPLE OF EQUAL POPULATION THAT MIGHT BE ANTICIPATED THROUGH ADHERENCE TO COUNTY LINES

	Deviation from Ratio of Representation	Districts in Five Most Populous Counties	Remaining Districts in Southern Part of Lower Peninsula	Districts in Upper Peninsula and Northern Part of Lower Peninsula
Degree of Under Representation (Positive Deviation)	80.1%-90.0%			
	70.1%-80.0%			
	60.1%-70.0%			
	50.1%-60.0%			
	40.1%-50.0%			
	30.1%-40.0%			
	20.1%-30.0%			
	10.1%-20.0%	3		
	0.1%-10.0%		8	3
Degree of Over Representation (Negative Deviation)	0.1%-10.0%	17	4	
	10.1%-20.0%	2	1	
	20.1%-30.0%			
	30.1%-40.0%			
	40.1%-50.0%			
	50.1%-60.0%			
	60.1%-70.0%			
	70.1%-80.0%			
	80.1%-90.0%			
		22	13	3

Note: Based on Senators' Map II B-1. Two districts on the line—the district for Oceana, Newaygo, Mecosta, and Muskegon Counties (No. 18, Senators' Map II B-1) and the district for Arenac, Bay, Midland, and Tuscola Counties (No. 14, Senators' Map II B-1)—are counted as districts in the Southern part of the Lower Peninsula.

TABLE VI

SENATE—DEPARTURE FROM PRINCIPLE OF EQUAL POPULATION THAT MIGHT BE ANTICIPATED IF 78 COUNTIES HAVING LESS THAN 13 FACTORS ARE ARRANGED INTO DISTRICTS HAVING AS NEARLY AS POSSIBLE 13 APPORTIONMENT FACTORS

	Deviation from Ratio of Representation	Districts in Five Most Populous Counties	Remaining Districts in Southern Part of Lower Peninsula	Districts in Upper Peninsula and Northern Part of Lower Peninsula
Degree of Under Representation (Positive Deviation)	80.1%-90.0%			
	70.1%-80.0%	1		
	60.1%-70.0%			
	50.1%-60.0%			
	40.1%-50.0%			
	30.1%-40.0%			
	20.1%-30.0%	10		
	10.1%-20.0%	3	1	
	0.1%-10.0%		5	
Degree of Over Representation (Negative Deviation)	0.1%-10.0%	4	3	
	10.1%-20.0%		4	
	20.1%-30.0%			
	30.1%-40.0%		1	
	40.1%-50.0%			2
	50.1%-60.0%			4
	60.1%-70.0%			
	70.1%-80.0%			
	80.1%-90.0%			
		18	14	6

Note: Based on Senators' Map II B-2. Two districts on the line—the district for Oceona, Newaygo, and Muskegon Counties (No. 19 Senators' Map II B-2) and the district for Osceola, Clare, Gladwin, Mecosta, Isabella, and Midland Counties (No. 18, Senators' Map II B-2)—are counted as districts in the Southern part of the Lower Peninsula.

TABLE VII

SENATE—DEPARTURE FROM PRINCIPLE OF EQUAL POPULATION THAT MIGHT BE ANTICIPATED IF 78 COUNTIES HAVING LESS THAN 13 FACTORS ARE ARRANGED INTO DISTRICTS HAVING NOT LESS THAN 10 NOR MORE THAN 16 APPORTIONMENT FACTORS—MINIMUM DISPARITY

	Deviation from Ratio of Representation	Districts in Five Most Populous Counties	Remaining Districts in Southern Part of Lower Peninsula	Districts in Upper Peninsula and Northern Part of Lower Peninsula
Degree of Under Representation (Positive Deviation)	80.1%-90.0%			
	70.1%-80.0%	1		
	60.1%-70.0%			
	50.1%-60.0%			
	40.1%-50.0%			
	30.1%-40.0%			
	20.1%-30.0%	10		
	10.1%-20.0%	3		
	0.1%-10.0%		3	
Degree of Over Representation (Negative Deviation)	0.1%-10.0%	4	4	
	10.1%-20.0%		7	
	20.1%-30.0%		1	
	30.1%-40.0%			1
	40.1%-50.0%			2
	50.1%-60.0%			2
	60.1%-70.0%			
	70.1%-80.0%			
	80.1%-90.0%			
		18	15	5

Note: Based on Senators' Map II B-4. Three districts on the line—the district for Benzie, Manistee, Mason, Oceana, and Muskegon Counties (No. 6, Senators' Map II B-2), the district for Osceola, Clare, Gladwin, Newaygo, Mecosta, Isabella, and Midland Counties (No. 7, Senators' Map II B-2), and the district for Arenac, Bay, Tuscola, and Huron Counties (No. 8, Senators' Map II B-2)—are counted as districts in the southern part of the Lower Peninsula.

TABLE VIII

SENATE—DEPARTURE FROM PRINCIPLE OF EQUAL POPULATION THAT MIGHT BE ANTICPATED IF 78 COUNTIES HAVING LESS THAN 13 FACTORS ARE ARRANGED INTO DISTRICTS HAVING NOT LESS THAN 10 NOR MORE THAN 16 APPORTIONMENT FACTORS—MAXIMUM DISPARITY

Deviation from Ratio of Representation	Districts in Five Most Populous Counties	Remaining Districts in Southern Part of Lower Peninsula	Districts in Upper Peninsula and Northern Part of Lower Peninsula
Degree of Under Representation (Positive Deviation)			
80.1%-90.0%			
70.1%-80.0%	1		
60.1%-70.0%			
50.1%-60.0%			
40.1%-50.0%			
30.1%-40.0%			
20.1%-30.0%	10	2	
10.1%-20.0%	3	3	
0.1%-10.0%		4	
Degree of Over Representation (Negative Deviation)			
0.1%-10.0%	4		
10.1%-20.0%		3	
20.1%-30.0%		1	
30.1%-40.0%			1
40.1%-50.0%			
50.1%-60.0%			2
60.1%-70.0%			3
70.1%-80.0%			4
80.1%-90.0%			
	18	13	7

Note: Based on Senators' Map II B-6. Two districts on the line—the district for Ogemaw, Iosco, Clare, Gladwin, Arenac, Isabella, and Midland Counties (No. 8, Senators' Map II B-6) and the district for Oceana, Newaygo, Mecosta, Montcalm, Gratiot, and Ionia Counties (No. 9, Senators' Map II B-6)—are counted as districts in the southern part of the Lower Peninsula.

CONCURRING OPINION

O'SULLIVAN, Circuit Judge, concurring: Joining in the sound opinion of Judge Kaess, I would like to add some observations as part of my concurrence. The task of this panel is to determine how far we may or should go in telling the majority of the people of a state what they can and what they cannot do. It is now our burden to find that line beyond which we may not go without arrogating to ourselves functions and prerogatives that, in the scheme of our government, do not belong to us. The power to legislate is not solely possessed by the national Congress, or State legislatures, but may be exercised directly by the people when they adopt, amend, or repeal a constitution. We recognize at once that, since *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, and *Gibbons v. Ogden*, 22 U.S. (9 Wheat) 1, it is no longer debatable that the Federal government, acting through its courts, may, within permissible limits, find illegal and strike down acts of legislatures which clearly offend the United States Constitution. We need here, however, to inquire how far today's law has extended the reach of judicial veto power.

Foremost among current decisions on apportionment are *Baker v. Carr*, 369 U.S. 186, *Gray v. Sanders*, 372 U.S. 368, and *Wesberry v. Sanders*, 26 U.S. L. Week 4142 (U.S. Feb. 17, 1964). We believe that the decision we now make is consistent with these judicial landmarks. *Baker v. Carr* deals directly with the subject before us. *Gray v. Sanders* and *Wesberry v. Sanders* are not, in our view, of controlling pertinence here. In *Wesberry*, Justice Black made clear that his qualified approval of the current "one man, one vote" slogan was limited to what he said was commanded by Article I, Section 2, of the United States Constitution.[1] *Wesberry* deals exclusively with districts from which are

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[1] Justice Black said, "We hold that, as construed in its historical context, the command of Art. I §2, that Representatives be chosen 'by the People of the several States' means that as nearly as is practicable one man's vote in a congressional election is to be worth as much as another's." (32 U.S. L. Week 4143.)

chosen representatives to the United States Congress. In a footnote, Justice Black stated that, "We do not reach the arguments that the Georgia statute violates the Due Process, Equal Protection, and Privileges and Immunities Clauses of the Fourteenth Amendment." (32 U.S. L. Week 4143).

If the *Wesberry* decision controlled the case at bar, we would be of the opinion that the "nearly as practicable" qualification to the "one man, one vote" principle would immunize the Michigan Constitution's apportionment of House of Representative districts from judicial attack. For the decision now required of us, we need not consider whether its apportionment of the thirty-eight senatorial districts would stand against the "one man, one vote" test. We do not believe that it is subject to such test.

We look here to be informed by *Baker v. Carr*. No United States Supeme Court case has yet decided that a constitution adopted by the people of a State is subject to the same attack as the enactments of their respective State legislatures.[2] Neither has the United States Supreme Court yet decided that a State will not hereafter be permitted to have either branch of its legislature apportioned other than on a strict population basis. For the decision we now make, however, we assume that a State's constitution is as vulnerable to judicial attack as the acts of its legislature.

Turning then to *Baker v. Carr* we do not read it as saying that the "one man, one vote" standard had to be followed by Michigan in adopting a formula for apportioning its senatorial seats. We think that its clear command goes no further than forbidding *invidious discrimination* in a State apportionment plan. A court, concluding that a particular plan is invidiously discriminatory, may declare its unconstitutionality vis-a-vis the Fourteenth Amendment of the United States Constitution. Absent such vice, a plan may be constitutional even though considerations other than strict population may have been part of the motivation

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[2] The Supreme Court of Michigan in *Scholle v. Hare*, 367 Mich. 176 (pending on certiorari *sub. nom. Beadle v. Scholle*) did so decide.

for its adoption. Out of the several opinions in *Baker v. Carr*, come such statements as:

> "The traditional test under the Equal Protection Clause has been whether a State has made 'an invidious discrimination' as it does when it selects 'a particular race or nationality for oppressive treatment.' Universal equality is not the test; there is room for weighing. As we stated in *Williamson v. Lee Optical Co.*, 348 U.S. 483, 489, 'The prohibition of the Equal Protection Clause goes no further than the invidious discrimination.'" *Douglas, concurring*, 369 U.S. 244, 245.

> "No one * * * contends that mathematical equality among voters is required by the Equal Protection Clause. But certainly there must be some rational design to a State's districting." *Clark, concurring*, 369 U.S. 258.

> "Not believing that numerical equality of representation throughout a State is constitutionally required, I would not apply such a standard, albeit a permissive one. * * * Moreover, there is no requirement that any plain have mathematical exactness in its application. Only where, as here, the total picture reveals incommensurables of both magnitude and frequency can it be said that there is present an *invidious discrimination.*" *Clark, concurring*, 369 U.S. 260 (Emphasis supplied.)

> "In *MacDougall v. Green*, 335 U.S. 281, the Court held that the Equal Protection Clause does not deny a State the power to assure a proper diffusion of political initiative as between its thinly populated counties and those having concentrated masses, in view of the fact that the latter have practical opportunities for exerting their political weight at the polls not available to the former.'" *Stewart, concurring*, 369 U.S. 265, 266.

While the opinion of Justice Brennan, speaking for the Court, does not employ language of like import to the above quotations from Justices Douglas, Clark, and

Stewart, we find nothing therein detracting from the validity of their observations. Justice Brennan was careful to define the reach of his decision as follows:

> "In light of the district court's treatment of the case, we hold today only (a) that the Court possesses jurisdiction of the subject matter; (b) that a justiciable cause of action is stated upon which appellants would be entitled to appropriate relief; and (c) because appellees raise the issue before this Court, that the appellants have standing to challenge the apportionment statutes." *Brennan, speaking for the Court*, 369 U.S. 197, 198.

If it is now the law that no representative body—be it the United States Congress, a State legislature, a county board of supervisors, a city's council or board of aldermen, or any other representative body whose members are elected from districts—can legally exist unless there is population equality between districts, then the task of the judiciary is simple and easy. We need do no more than, by judicial command, forbid anything else.

If, however, anything other than obedience to such an easy rule is to be tolerated—if something be left to the considered judgment of the majority of a State's people or its legislatures—shall we make precise how much leeway we, the judges, will let them have? We must, of course, strike down invidious discrimination and any other impermissible plan, such as one where inequalities arise from the race, creed or color of those affected by it. Where we find, however, that the lack of precise equality in an apportionment plan is not gross and is the product of reasonable and intelligent weighing of what is fair and conducive to the total good, shall we intrude to say that only our judgment and discretion will do? If some departure from mathematical exactness is permissible, what is the range of allowable percentages in such departures? Will 2%, 5% 10%, 20% or 25% be acceptable to us? If the Sixth Circuit says that 10% is the outer limit, will the Seventh Circuit be forbidden to put up with 15%? Shall the discretion or political judgment of a majority of a three-judge district court control?

We think it pertinent to say that the facts in *Baker v. Carr*, *Gray v. Sanders* and *Wesberry v. Sanders* bear no resemblance to those which are the background to the case before us. Michigan's plan for apportioning the seats in its House and Senate will not create or tolerate any "rotten boroughs." Its 80-20 plan for the Senate and its almost precise adherence to population equality in the House exhibits intelligent and rational design and does not in any degree reveal "incommensurables of both magnitude and frequency." *Baker v. Carr*, 369 U.S. 260.

Michigan's new Constitution was not the product of hurried or partisan maneuvering, or of gradual and hidden erosion of the people's rights. The people of Michigan, by popular vote, decided to have a constitutional convention. Pursuant to that mandate, a convention was assembled. Out of that assembly's free and unfettered interchange and collision of ideas—between political scientists, practical politicians, lawyers and students of constitutional government, labor leaders, industrialists, and just plain citizens of all races and creeds—came for consideration by the entire people of Michigan a proposed constitution. The question of whether this proposed people's legislation was wise and proper was vigorously contested at the convention and during the months that followed its submission for adoption or rejection by the people. All of its provisions were exposed to the searching light of today's media of public information. Thus informed, the people of Michigan made a deliberate choice and, though the closeness of the vote portrays the vigor of the people's search for what was right, the legislation here under attack was adopted by a majority vote of the people of this State. In making this deliberate choice, every man's vote was equal to that of any other. Unless the attacked Article of the Michigan Constitution is infected with illegality, a decree, granting the relief sought by plaintiffs, would dilute and debase the vote of every elector who cast his vote with the majority. Finding no such illegality, we decline to do so.

A canvass of the vote on the Constitution discloses that its adoption did not come about through the predominant

power of any part of the State over another. It does not disclose a victory of one race or creed over another; it does not disclose a victory of Republicans over Democrats;[3] it was not a victory of the rural over the urban, or of capital over labor; neither can we discern any influences or pressures except what are traditional in American political contesting. It is true that issues other than Article IV, Sections 2-6, played a part in the vote pattern, but the Article before us was prominent in the public discussions which preceded the voting.

No clear picture emerges from a study of the vote except that the majority of the people of Michigan made a considered and deliberate choice. For our conclusion, we assume, as plaintiffs insist, that we, the federal judges, may have the right, under some circumstances, to tell the people of Michigan that they cannot have what they chose for themselves. We are not persuaded, however, that the 1963 choice of a Constitution by the People of Michigan was a deliberate or unwitting creation of an invidiously discriminatory plan of apportionment.

The complaint should be dismissed.

Clifford O'Sullivan,
United States Circuit Judge.

Dated at Port Huron, Michigan,
this 16th, March, A.D., 1964.

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[3] Wayne County, Michigan, recognized now as a Democratic stronghold, usually voting on a basis of about 65% Democratic and 35% Republican, voted in the constitutional election 245,410 for and 294,629 against the Constitution. The five most populous counties, whom the plaintiffs assert are the victims of discrimination, in total voted 441,530 for and 457,294 against the Constitution. Rural counties, which are claimed to be unfairly favored by the discrimination which plaintiffs assert is in the Constitution, in many instances voted strongly against the Constitution, and it would have gone down except for the heavy favorable vote in the urban populous counties. It might be thought that this discussion of political parties should not be mentioned. The judiciary, however should not pretend such naivete as not knowing that politics is here involved.

APPENDIX B

DISSENTING OPINION

Stephen J. Roth, District Judge.

With due deference to the views of my colleagues, so ably expressed in Judge Kaess' majority opinion, and in Circuit Judge O'Sullivan's concurring opinion, I find myself unable to agree and therefore dissent.

The issue before the Court is whether the Michigan Constitution of 1963, so far as it pertains to the establishment and arrangement of State Senate and House districts, denies to plaintiffs, and to others similarly situated, the equal protection of the laws guaranteed by the Fourteenth Amendment to the Constitution of the United States and such other rights as are secured to plaintiffs by law.

The short answer to that is that it does.

The 1963 Constitution, so far as it relates to the apportionment of the Michigan Legislature, has fatal flaws which will not pass constitutional inspection. We speak now of the Federal standards, but, suggest, as we shall later explore, that it fails to pass State constitutional standards as well. But more of that anon.

The time setting of the adoption of the proposed Constitution by the convention should be noted. The convention convened October 3, 1961. *Baker v. Carr*, 369 U.S. 186, was handed down on March 26, 1962; *Scholle v. Hare*, 367 Michigan 176, was handed down July 18, 1962; and a stay order by a Justice of the United States Supreme Court issued July 27, 1962. Certain changes submitted to the apportionment provisions of Article IV of the proposed Constitution at 11:00 o'clock the morning of August 1, 1962, the last day of the convention, despite the protestations of at least one delegate that haste might result in "irremediable error." "It must be remembered," he said, "that once the convention adjourns sine die, its powers are exhausted and,

however bad an error may be, that error cannot be corrected." (Constitutional Convention Record, page 3299.)

Whether because of haste or otherwise, the provisions of the proposed, and later adopted, 1963 Consitution are in violation of the Fourteenth Amendment of the Constitution of the United States, as we shall more fully detail. The booby traps and fishhooks in its provisions respecting the establishment and arrangement of legislative districts, if given effect, result in the amendment of the proposition that:

"All men are created equal."
to
"All men are created equal—except city people."

It is true that the United States Supreme Court has, at least to this date, refused repeated invitations to interpret the nature of representative democracy in exact terms of the distribution of power among people, or to say to what degree the majority must control government. But one can legitimately and reasonably conclude from *Baker v. Carr*, 369 U.S. 186, and *Wesberry v. Sanders*, 32 L.W. 4142, that the Court is proceeding in the direction of a holding that "republican government" requires a popular democracy, which presupposes an equality of individuals and their voting power. Even now *Baker v. Carr* stands for the proposition that discrimination in apportionment will be permitted *only* if based upon a rational classification, but not if it is invidious, i.e. arbitrary or capricious.

It is submitted that the Supreme Court handwriting is on the wall, for him who will to read. *Wesberry and Baker* are not the last words; they are only the latest. How far that Court will go, or rather, how fast it will go, is something we have to leave to another day. It was observed by De Tocqueville some 150 years ago that the distinctive characteristic of America was a constant striving for equality.

The built-in, "fair" advantage in the 1963 Constitution is completely at odds with our concept of the equality of man. How can one justify an apportionment system which

favors a segment of the population of the state? We must remember that plans of apportionment are devised by men to control the affairs of men; and remember too that men, in self-interest, are sometimes capable of rising above principle to grasp control of government. As pointed out by Judge Doyle in his dissent in *Lisco v. Love*, (Colo.), 219 F. Supp. 922, page 943:

> "Governments are devised to arrange the affairs of men. Economic interests are remarkably well represented without special representation. It is dangerous to build into a political system of favored position for a segment of the population of the state. There exists no practical method of ridding ourselves of them, and long after the institutions pass, the built-in advantage remains even though it is at last only a vestige of the dead past."

To get to the heart of the issue before us, I repeat the question I put to counsel during the oral arguments in this case:

> "What is wrong with people?"

The framers of the Declaration of Independence made it the basis of our government that all men are created equal and endowed with certain unalienable rights. In doing so, they pointedly repudiated Aristotle's notion that:

> "* * * some should rule and others be ruled is a thing, not only necessary, but expedient; from the hour of their birth, some are marked out for subjection, others for rule."

The conception of political equality has been retained and reinforced throughout the history of this nation, from that Declaration, the United States Constitution, Lincoln's Gettysburg Address, and on through the constitutional amendments.

Our fundamental beliefs and the values by which we live as a nation demand an acknowledgment that men have the capacity to govern themselves, that we have faith in the

rights of the individual. They cast aside the notion that our neighbor does not count, or that he counts for more or less than his neighbor.

In our scheme of government, there is no provision for nor room for, a caste system, even of the wise and the good. Nowhere is there to be found even an intimation that some of our citizens have greater or less political capacity or power than others.

Even if we disregard, for the moment, the foundation stones of the federal government, and particularly Article IV, Section 4 of the United States Constitution, guaranteeing to every state of the union a republican form of government, and look only to the State of Michigan and its fundamental law, we find explicit recognition of the worth and value of the individual. See "An Ordinance for government of the territory of the United States, northwest of the River Ohio," The Confederate Congress, July 13, 1787, Articles of Compact, Sec. 14, and Article II, Bill of Rights:

> "The inhabitants of the said territory *shall always be entitled to* the benefits of the writ of habeas corpus, and of the trial by jury; of *a proportionate representation of the people in the legislature*, and of judicial proceedings according to the course of the common law."

And see also the Constitutions of the State of Michigan, 1835, 1850, and 1908, which provided for substantial equality among the people in their representation in both Houses of the State Legislature.

Both our basic federal documents and the basic state documents are premised on the basic fact of our form of government: All men are created equal. As pointed out in *Giddings v. Secretary of State*, 93 Michigan 1, at page 7:

> "It was never contemplated that one elector should possess two or three times more influence, in the person of a Representative or Senator, than another elector of another district. *Each, insofar as it is practicable, is, under the Constitution, possessed of equal*

power and influence. Equality in such matters lies at the basis of free government. It is guaranteed, not only by the Constitution, but by the Ordinance of 1787, organizing the territory out of which the State of Michigan was carved."

The majority opinion and the argument of intervenors both lay considerable stress upon the assertion that the county should be recognized as a basic unit for purposes of apportionment. Alternately, intervenors argue that history should be recognized in the consideration of the validity of the apportionment arrangement in the 1963 State of Michigan Constitution. What history? And who holds the proxy for history? Here again, *Williams v. Secretary of State*, 145 Michigan 447, at page 449, makes it plain that the county was not then a basis of apportionment. The dissenting opinion of Mr. Justice Talbot Smith, in *Scholle v. Hare*, 360 Michigan 1, at page 58 says:

"Michigan does not employ the political unit basis."

As for the proposition that the 1963 Michigan Constitution was "solemnly" adopted by the people (by a majority of considerably less than one per cent)—to begin with, there may well be a serious question as to whether the constitutional convention was called in contravention of the Fourteenth Amendment. The 144 delegates to the Constitutional Convention, elected in April 1961, were allocated to and elected from the 110 State Representative districts and the 34 State Senatorial districts. See the Tennessee case now in the Supreme Court, *West v. Carr*, 370 SW 2d 469, Supreme Court Docket No. 706, which raises this question:

"Does the 1962 Tennessee Statute calling a Constitutional Convention to propose amendments to the State Constitution abridge the Fourteenth Amendment because the statute apportions convention membership on the basis of legislative apportionment formula rejected in *Baker v. Carr*, 369 U.S. 186?"

But let us lay aside this question. Let us turn our attention to the "Address to the People" which, according to the provisions of Act No. 8 of the Public Acts of 1961, Section 168.181 of the Compiled Laws of 1948, as amended, was to serve the purpose of:

> "* * * explaining the proposed changes in the present constitution, and the reason for such changes. * * *"

In its prolegmonena, the Address adopts the statement of Professor Paul Kauper, as to the mission of the delegates:

> "To fashion a fundamental order of government that preserves the continuity of our constitutional tradition by holding fast to that which is good, but which will be adequate to meet not only today's but also tomorrow's needs. * * *"

If that was the objective, then it is this writer's humble opinion that the mark was missed, for nothing is more fundamental to our form of government, be it national or state, than equality in representation * * * of people. In its explanation to the people of the state, there was an obvious misstatement of fact, see page 5, under the heading "The Legislative Branch," paragraph 2:

> "A *House of Representatives on a population basis* and a Senate on a combined population area basis (giving 80% weight to population and 20% weight to area) with as mathematically exact a system as possible for assigning a prescribed number of seats to each chamber. The application of these formulas will bring Michigan to the forefront of the states in the fairness and equity of its system for allotting the legislative representation among its population."

It is true that under Article IV, the fine print appears. But it is unlikely that the average reader, even if he read the Address, or the proposed Constitution, could have understood, without some training in political science, mathematics, and the law, and without extensive study, the ".7%," "county lines," and "75% to 125%" provisions, to

say nothing about "equal proportions." It has taken the members of this Court some considerable time to digest the meaning, in applied form, of these provisions. So that to say that the people of the State of Michigan solemnly adopted these precise provisions of the Constitution is an indulgence in rhetoric only. But even if we assume, arguendo, that they understood the implications of these provisions, it is too clear for argument that constitutional law is not a matter of majority vote. Indeed, the philosophy of the Fourteenth Amendment teaches us that it is personal rights which are to be protected against the will of the majority. And as a matter of common knowledge, the proponents of the 1963 Constitution used as a selling point, that whatever defects it might possess could and would be corrected, but that overall it was a better basic law than its predecessor. If certain provisions of the 1963 Constitution are constitutionally defective, had it been adopted by a unanimous vote, it could not be left to stand. I take it that no one would postulate, at this late date, that because discriminatory racial legislation enjoyed overwhelming support in some of our states, it would be validated. Manifest inequality cannot be effectuated by a majority vote.

The fact of enactment of the new Constitution, even though by the slimmest of margins, generates restraint; but we cannot, true to our oath, uphold such provisions of it as are palpable infringements of the rights of individual citizens. The protection of constitutional rights is not to be approached pragmatically or expediently.

The delegates to the constitutional convention had no immunity from the United States Constitution. They were bound to be as responsive to that basic law as were the citizens who elected them. And when, as I believe to be true in this case, the mainspring of representative government is impaired, we should not preclude judicial relief. The entire thrust of today's legal climate is to end unconstitutional discrimination.

It is manifest by its very terms that the 1963 Constitution does not, as conceded by the majority, provide for a straight population formula even for the House of Representatives.

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If that had been the intention, it could have been accomplished easily by stopping after providing (Article IV, Section 3):

> "The House of Representatives shall consists of 110 members elected for two-year terms from single member districts apportioned on a basis of population. * * *"

This was not done, but the qualifications of "county lines," ".7%," and "not less than 75% nor more than 125%" were added.

It may be of significance that neither the Address to the People, briefs and arguments of intervenors, nor the majority opinion give any explanation of the magic figures ".7%," "75% to 125%," or "80-20." It seems to me that a justification of these were, and are, in order. None has been advanced.

A review of these provisions, as well as the provision for the establishment of an apportionment commission, leaves only the gratuitous to assume that they were not intended to promote minority control of the legislature. These provisions, as well as those relating to the arrangement of the Senate, are not accidental and inadvertent, but calculated and purposeful.

It appears that the majority of the delegates to the convention made a legal guess that if they came *close* to a straight population apportionment in the House, they could do whatever they pleased in the matter of the apportionment of the Senate. The imbalance is not by accident, but by design. Even the apportionment commission is allotted on an area basis, and in such wise as to make it virtually certain to fail to accomplish its mission.

The end result of the whole of the provisions with respect to apportionment is a guarantee that minority rule shall prevail; and in the course of time, they could not but accentuate the discrimination toward the majority of the citizens of the state.

We cannot say what the highest Court in the land will finally say with respect to the propriety of apportioning one House of a State Legislature on a straight population basis and the other on population and/or other factors. There are those who believe that such an arrangement will meet constitutional tests. It is unprofitable to hazard a guess. But in this case, we do not have to indulge in prophecy, for neither the House nor the Senate can be apportioned on a population basis if the qualifying provisions are complied with.

There is a serious question of the validity of the provisions for apportionment from another standpoint, as so ably pointed out by Mr. Justice Eugene Black, of the Michigan Supreme Court, in his memorandum, "In the Matter of the Apportionment of the Michigan State Legislature," (as yet unreported) March 1964:

> "The supremacy clause considered, the constitution of each of the States has written into it, firmly as if printed before the reader's eyes, a special and controlling proviso which in so many words says that, when that State's Constitution is capable of 2 constructions, one of which would conflict with some provision of the National Constitution, the other must prevail. Thus it is that the equality clause of the National Constitution complements and supplements and, in case of conflict, modifies to the extent of such conflict the Constitution of each of the States. The equality clause, is, indeed, 'as much a part of the Constitution of every State as its own local laws and Constitution.' (*Blythe v. Hinckley*, 173 U.S. 501.)"

The provisions of Article IV of the 1963 Michigan Constitution respecting apportionment cannot be read without considering Article I, Sections 1 and 2:

> "Sec. 1. All political power is inherent in the people. Government is instituted for their equal benefit, security, and protection."

"Sec. 2. No person shall be denied the equal protection of the laws; nor shall any person be denied the enjoyment of his civil or political rights or be discriminated against in the exercise thereof because of religion, race, color, or national origin * * *."

The guiding rule of constitutional construction from the time of Chief Justice Marshall down has been that no one provision is to be separated from the others and considered alone, but that all provisions bearing upon a particular subject shall be brought into view and interpreted so as to effectuate the great purposes of the instrument. See *Ullmann v. U. S.*, 350 U.S. 422. It is necessary, therefore, to construe Article IV, together with Sections 1 and 2 of Article I, and in the light of the requirements of the Fourteenth Amendment to the United States Constitution. So viewed, the provisions of the 1963 Constitution relating to the apportionment of the legislature cannot stand.

As a sidelight, it may be well to add that there is a serious question as to whether the proviso at the end of Article III, Section 2 squares with the guarantee clause of the Federal Constitution. The section provides that "The powers of government are divided into three branches: legislative, executive, and judicial. No person exercising the powers of one branch shall exercise powers properly belonging to another branch *except as expressly provided in this constitution.*" (Italics supplied.)

Article IV, Section 6, Paragraph 7, then proceeds to allot to the Supreme Court of the State the power to make a legislative judgment (which plant to adopt, in the event the apportionment commission does not agree), and later provides for it to trade in its legislative beret for the judicial one (paragraph 8 of Section 6 of Article IV) and apply constitutional tests. The roles are obviously incompatibe.

If there is something wrong with the one person, one-vote formula of *Wesberry v. Sanders*, 32 L.W. 4142, neither pleadings, briefs, nor arguments in this case tell us why. If there are valid reasons for weighting the vote of one

person and shaving the vote of another, they have not been advanced. We hear the refrain that the minority must be protected. But what of the majority? What protection have they had in the legislature of the State of Michigan (and many other states) these many years, when that body has steadfastly refused to reapportion in accordance with the constitutional mandate?

The provisions of the 1963 Constitution give a preferred place in the scheme of government to the voter in the sparsely settled portions of the state. Is this because there is more space around him? Does this make him a better voter? By what constitutional or other legal rule or principle is assigned to him the right to vote the franchise granted to the millions of acres of federal and state park land and water?

Are the urban dwellers to be treated, to use Homer's words, like "dishonored strangers?" As Aristotle says:

> "The citizen who is partly excluded from the honors of the state is no better than a part alien. And when this partial exclusion is concealed, the object is that the privileged class may deceive them."

What manner of men are they whose votes shall be weighted?

And what manner of men are they whose votes shall be shaved?

And who shall decide which to weight and which to shave?

It is argued that the apportionment formulae for House and Senate in the 1963 Constitution give the majority a greater representation than has been the case in the past. To say that something is not as bad as it has been is not to say that it is right. The plaintiffs in this case, and others like them, are not asking for a handout but asserting a claimed constitutional right. This argument falls of its own weight, as does the argument that absolute mathematical precision cannot be achieved. To say that because mathematical precision cannot be attained does not

preclude coming as close to it as can be every ten years, nor does it justify a greater departure from equal proportions than necessary.

The teachings of United States Supreme Court cases beginning with *Baker v. Carr* to the present day I interpret as meaning that an apportionment cannot be permitted which would allow a blocking of major legislation desired by the majority of the electors of the State of Michigan. Effecting the will of the majority of the people of a state must be deemed the sine qua non of any constitutional plan of apportionment. This means that at least one House of the Legislature of Michigan must be apportioned on a strict equal-population basis as nearly as this can be accomplished, in order to meet the requirement of rationality, and to avoid any taint of invidious discrimination. It may be that it is permissible to apportion the other House on a basis which takes into account cogent and relevant factors other than population. These other factors, however, must be more meaningful than mere area; and the weight given to them should not be such as to destroy the foundation principle of majority rule, or result in invidious discrimination or irrationality in apportionment. In other words, giving effect to such other factor or factors must not be permitted to govern to such an extent that a majority of the population of Michigan is put into such an inferior position in respect to such other House that legislation needed for the good of the whole state might be blocked. No case is cited by my colleagues, by counsel, and none found by the writer, which recognizes area alone as a valid factor for apportionment purposes. The plain fact is that any meaningful, valid non-population factor invariably squares with the population distribution. Consider such matters as taxes paid, capital investments, assessed valuation of property, industry, etc. Each of these is tied irrevocably to people: area exists independent of any person.

Let us add a word about custom. The custom which emerges most clearly from a hard look at the history of

Michigan is the continuous refusal of the body constitutionally charged with the duty of periodic reapportionment to discharge its constitutional duty.

As pointed out in *Gray v. Sanders*, 372 U.S. 368, 9 L. Ed. 2d 821, at page 830:

> "The concept of 'we the people' under the Constitution visualizes no preferred class of voters but equality among those who meet the basic qualifications. The idea that every voter is equal to every other voter in his state, when he casts his ballot in favor of one of several candidates, underlies many of our decisions.
>
> "* * *
>
> "* * * and, as previously noted, there is no indication in the Constitution that homesite or occupation affords a permissible basis for distinguishing between qualified voters within the state."

And see Judge Bigg's opinion in *Sincock v. Duffy*, 215 F. Supp. 169, at pages 187 and 188:

> "Although population density, extent of agricultural and industrial development and expanding city and suburban and semi-suburban areas are deemed to be cogent factors in considering apportionment, no very persuasive factor justifying any very special treatment in the apportionment of the Senate of the General Assembly can fairly be said to lie in any purely geographical factor."

The issue for determination in this case is whether the disparities provided for and locked into the 1963 Constitution are so substantial and irrational as to constitute invidious discrimination so as to violate the equal protection of the laws—Fourteenth Amendment of the Constitution of the United States.

For the reasons I have given above, I would hold that the plant of apportionment of the Michigan Legislature, as provided for in the 1963 Constitution, with its inequalities, is not based upon a rational formula consistent with

constitutional requirements, and more specifically that such plan does not provide for the districting of either House of the Legislature on a population basis, and that the Senate districting plan, calling for an area factor to be employed, is arbitrary, capricious, and constitutionally unjustified. There is here no "practical equality" with "rational deviations."

This holding, if effectuated, means that the provisions of Article IV of the 1963 Michigan Constitution, except for Section 1, the first paragraph of Section 2, and that portion of Section 3, which reads,

> "The House of Representatives shall consist of 110 members elected for two-year terms from single member districts apportioned on a basis of population,"

are constitutionally void and of no effect; that the legislature under its general legislative powers can and should apportion both Houses of the Legislature, in accordance with Federal and state constitutional standards and limits, failing which, within a reasonable time, this Court should order elections for both Houses to be held at large.

Stephen J. Roth,
United States District Judge.

Dated: March 16, 1964,
Detroit, Michigan.

APPENDIX C

JUDGMENT DENYING PLAINTIFFS ALL RELIEF

This action came on for trial before a District Court of three judges, duly constituted under Section 2284, Title 28, United States Code, the members of which were the Honorable Clifford O'Sullivan, United States Circuit Judge, the Honorable Fred W. Kaess, United States District Judge, and the Honorable Stephen J. Roth, United States District Judge, and the issues having been duly tried and a decision having been duly rendered, the Honorable Stephen J. Roth dissenting,

It is ordered and adjudged that the plaintiffs be denied all relief, and that the action be dismissed on the merits, without costs.

Dated at Detroit, Michigan, March 16, 1964.

Frederick W. Johnson,
Clerk of the Court.

APPENDIX D

MICHIGAN CONSTITUTION, 1963

ARTICLE IV—Legislative Branch

Sec. 2. The senate shall consist of 38 members to be elected from single member districts at the same election as the governor for four-year terms concurrent with the term of office of the governor.

In districting the state for the purpose of electing senators after the official publication of the total population count of each federal decennial census, each county shall be assigned apportionment factors equal to the sum of its percentage of the state's population as shown by the last regular federal decennial census computed to the nearest one-one hundreth of one percent multiplied by four and its percentage of the state's land area computed to the nearest one-one hundredth of one percent.

In arranging the state into senatorial districts, the apportionment commission shall be governed by the following rules:

(1) Counties with 13 or more apportionment factors shall be entitled as a class to senators in the proportion that the total apportionment factors of such counties bear to the total apportionment factors of the state computed to the nearest whole number. After each such county has been allocated one senator, the remaining senators to which this class of counties is entitled shall be distributed among such counties by the method of equal proportions applied to the apportionment factors.

(2) Counties having less than 13 apportionment factors shall be entitled as a class to senators in the proportion that the total apportionment factors of such counties bear to the total apportionment factors of the state computed to the nearest whole number. Such counties shall thereafter be arranged into senatorial districts that are compact, con-

venient, and contiguous by land, as rectangular in shape as possible, and having as nearly as possible 13 apportionment factors, but in no event less than 10 or more than 16. Insofar as possible, existing senatorial districts at the time of reapportionment shall not be altered unless there is a failure to comply with the above standards.

(3) Counties entitled to two or more senators shall be divided into single member districts. The population of such districts shall be as nearly equal as possible but shall not be less than 75 percent nor more than 125 percent of a number determined by dividing the population of the county by the number of senators to which it is entitled. Each such district shall follow incorporated city or township boundary lines to the extent possible and shall be compact, contiguous, and as nearly uniform in shape as possible.

Sec. 3. The house of representatives shall consist of 110 members elected for two-year terms from single member districts apportioned on a basis of population as provided in this article. The districts shall consist of compact and convenient territory contiguous by land.

Each county which has a population of not less than seven-tenths of one percent of the population of the state shall constitute a separate representative area. Each county having less than seven-tenths of one percent of the population of the state shall be combined with another county or counties to form a representative area of not less than seven-tenths of one percent of the population of the state. Any county which is isolated under the initial allocation as provided in this section shall be joined with that contiguous representative area having the smallest percentage of the state's population. Each such representative area shall be entitled initially to one representative.

After the assignment of one representative to each of the representative areas, the remaining house seats shall be apportioned among the representative areas on the basis of population by the method of equal proportions.

Any county comprising a representative area entitled to two or more representatives shall be divided into single member representative districts as follows:

(1) The population of such districts shall be as nearly equal as possible but shall not be less than 75 percent nor more than 125 percent of a number determined by dividing the population of the representative area by the number of representatives to which it is entitled.

(2) Such single member districts shall follow city and township boundaries where applicable and shall be composed of compact and contiguous territory as nearly square in shape as possible.

Any representative area consisting of more than one county, entitled to more than one representative, shall be divided into single member districts as equal as possible in population, adhering to county lines.

Sec. 4. In counties having more than one representative or senatorial district, the territory in the same county annexed to or merged with a city between apportionments shall become a part of a contiguous representative or senatorial district in the city with which it is combined, if provided by ordinance of the city. The district or districts with which the territory shall be combined shall be determined by such ordinance certified to the secretary of state. No such change in the boundaries of a representative or senatorial district shall have the effect of removing a legislator from office during his term.

Sec. 5. Island areas are considered to be contiguous by land to the county of which they are a part.

Sec. 6. A commission on legislative apportionment is hereby established consisting of eight electors, four of whom shall be selected by the state organizations of each of the two political parties whose candidates for governor received the highest vote at the last general election at which a governor was elected preceding each apportionment. If a candidate for governor of a third political party has received at such election more than 25 percent of such gubernatorial vote, the commission shall consist of 12 members, four of whom shall be selected by the state organization of the third political party. One resident of each of the following four regions shall be selected by each political

party organization: (1) the upper peninsula; (2) the northern part of the lower peninsula, north of a line drawn along the northern boundaries of the counties of Bay, Midland, Isabella, Mecosta, Newaygo and Oceana; (3) southwestern Michigan, those counties south of region (2) and west of a line drawn along the western boundaries of the counties of Bay, Saginaw, Shiawassee, Ingham, Jackson and Hillsdale; (4) southeastern Michigan, the remaining counties of the state.

No officers or employees of the federal, state or local governments, excepting notaries public and members of the armed forces reserve, shall be eligible for membership on the commission. Members of the commission shall not be eligible for election to the legislature until two years after the apportionment in which they participated becomes effective.

The commission shall be appointed immediately after the adoption of this constitution and whenever apportionment or districting of the legislature is required by the provisions of this constitution. Members of the commission shall hold office until each apportionment or districting plan becomes effective. Vacancies shall be filled in the same manner as for original appointment.

The secretary of state shall be secretary of the commission without vote, and in that capacity shall furnish, under the direction of the commission, all necessary technical services. The commission shall elect its own chairman, shall make its own rules of procedure, and shall receive compensation provided by law. The legislature shall appropriate funds to enable the commission to carry out its activities.

Within 30 days after the adoption of this constitution, and after the official total population count of each federal decennial census of the state and its political subdivisions is available, the secretary of state shall issue a call convening the commission not less than 30 nor more than 45 days thereafter. The commission shall complete its work within 180 days after all necessary census information is available. The commission shall proceed to district and appor-

tion the senate and house of representatives according to the provisions of this constitution. All final decisions shall require the concurrence of a majority of the members of the commission. The commission shall hold public hearings as may be provided by law.

Each final apportionment and districting plan shall be published as provided by law within 30 days from the date of its adoption and shall become law 60 days after publication. The secretary of state shall keep a public record of all the proceedings of the commission and shall be responsible for the publication and distribution of each plan.

If a majority of the commission cannot agree on a plan, each member of the commission, individually or jointly with other members, may submit a proposed plan to the supreme court. The supreme court shall determine which plan complies most accurately with the constitutional requirements and shall direct that it be adopted by the commission and published as provided in this section.

Upon the application of any elector filed not later than 60 days after final publication of the plan, the supreme court, in the exercise of original jurisdiction, shall direct the secretary of state or the commission to perform their duties, may review any final plan adopted by the commission, and shall remand such plan to the commission for further action if it fails to comply with the requirements of this constitution.

APPENDIX E

FEDERAL STATUTES

42 U.S.C. §1983:

"*Civil action for deprivation of rights.* Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress."

42 U.S.C. §1988:

"*Proceeding in vindication of civil rights.* The jurisdiction in civil and criminal matters conferred on the district courts by the provisions of this chapter and Title 18, for the protection of all persons in the United States in their civil rights, and for their vindication, shall be exercised and enforced in conformity with the laws of the United States, so far as such laws are suitable to carry the same into effect; but in all cases where they are not adapted to the object, or are deficient in the provisions necessary to furnish suitable remedies and punish offenses against law, the common law, as modified and changed by the constitution and statutes of the State wherein the court having jurisdiction of such civil or criminal cause is held, so far as the same is not inconsistent with the Constitution and laws of the United States, shall be extended to and govern the said courts in the trial and disposition of the cause, and, if it is of a criminal nature, in the infliction of punishment on the party found guilty."

28 U.S.C. §1343:

> "*Civil rights and elective franchise.* The district courts shall have original jurisdiction of any civil action authorized by law to be commenced by any person:
>
> "(3) To redress the deprivation, under color of any State law, statute, ordinance, regulation, custom or usage, of any right, privilege or immunity secured by the Constitution of the United States or by any Act of Congress providing for equal rights of citizens or of all persons within the jurisdiction of the United States. * * *"

APPENDIX F

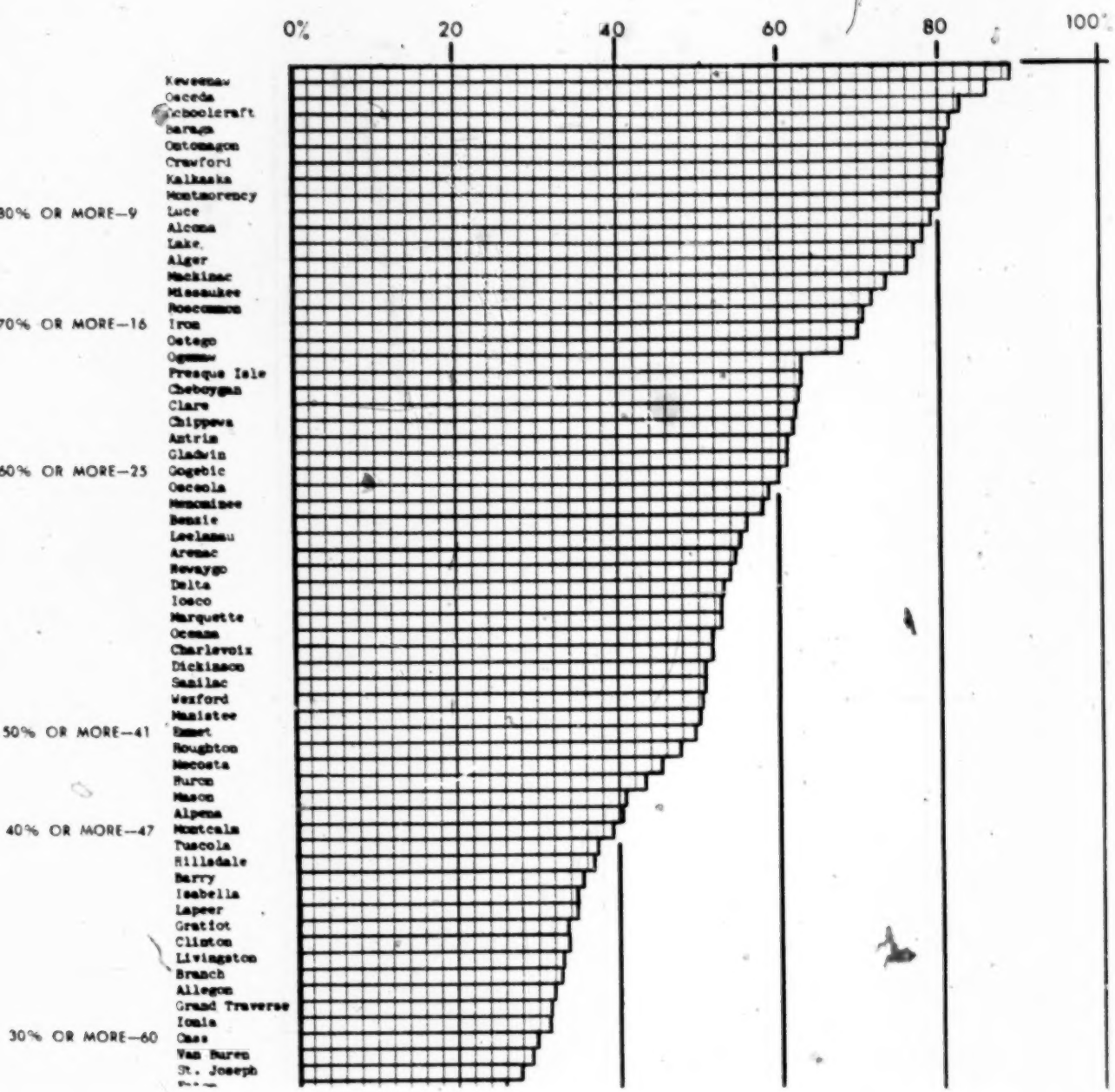
United States Constitution, Amendment XIV, §1:

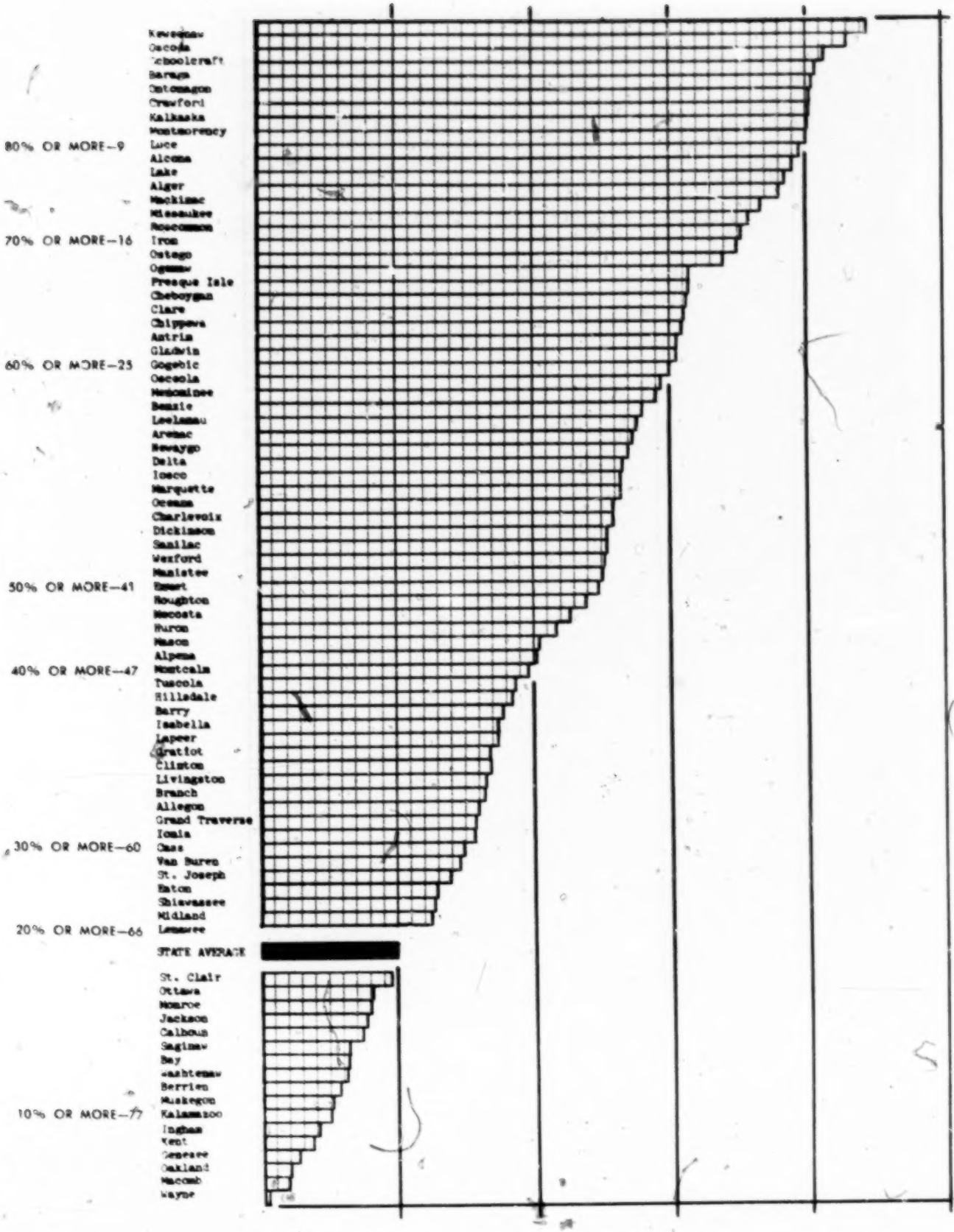
> §1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privilege or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law nor deny to any person within its jurisdiction the equal protection of the laws.

APPENDIX G

Percent of Senate Representation Based on Area, By County, Under Article IV, Section 2, of Revised Michigan Constitution

("80-20" FORMULA)




Keweenaw
Oscoda
Schoolcraft
Baraga
Ontonagon
Crawford
Kalkaska
Montmorency
80% OR MORE—9
Luce
Alcona
Lake
Alger
Mackinac
Missaukee
Roscommon
70% OR MORE—16
Iron
Ostego
Ogemaw
Presque Isle
Cheboygan
Clare
Chippewa
Antrim
Gladwin
60% OR MORE—25
Gogebic
Oscecla
Menominee
Benzie
Leelanau
Arenac
Newaygo
Delta
Iosco
Marquette
Oceana
Charlevoix
Dickinson
Manistee
Wexford
50% OR MORE—41
Emmet
Houghton
Mecosta
Huron
Mason
Alpena
40% OR MORE—47
Montcalm
Tuscola
Hilledale
Barry
Isabella
Lapeer
Gratiot
Clinton
Livingston
Branch
Allegan
Grand Traverse
Ionia
30% OR MORE—60
Cass
Van Buren
St. Joseph
Eaton
Shiawassee
Midland
20% OR MORE—66
Lenawee
STATE AVERAGE
St. Clair
Ottawa
Monroe
Jackson
Calhoun
Saginaw
Bay
Washtenaw
Berrien
Muskegon
10% OR MORE—77
Kalamazoo
Ingham
Kent
Genesee
Oakland
Macomb
Wayne